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ABSTRACT

Three educational malpractice cases and the issues arising from them are examined in this article. The cases are examined in terms of whether school administrators, teachers, and guidance counselors owe a legal duty to students to exercise the ordinary skill and competence of a reasonable and prudent member of their profession; whether educators should be accountable for failure to exercise due care in the discharge of their school duties; and whether the broad areas of tort law (negligence, intentional tort, and misrepresentation) exist in educational malpractice cases. Although the plaintiffs lost, the cases are credited with bringing forth the issues and problems inherent in educational malpractice litigation. (Author/MLF)

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EDUCATIONAL MALPRACTICE: FANTASY OR REALITY?

June R. Braverman

Introduction

During the past quarter century the courts have made substantial progress toward equal educational opportunity for the citizens of this country. The United States Supreme Court in *Brown v. Topeka* (1954) declared that the quality of every child's education is poorer when schools are racially segregated. *PARC v. Commonwealth of Pennsylvania* (1971) established an equitable format for providing free public education to school-age handicapped children according to individual ability and educational needs, while *Serrano v. Priest* (1971) determined that financial resources in California must be equalized because the quality of education depends on those resources. Now that the courts have addressed equalization of educational *opportunity*, they have been asked to address equalization of educational *quality*.

Public education, the nation's largest consumer industry, has spawned a growing body of militant consumers. Can these militant consumers demand that the traditional concepts of law governing performance by the medical and legal professions, business, and industry be extended to education? Some predict that the courts in the 1980s will need to address this question, considering the legal recourses available to parents and students who feel that the schools are not meeting their responsibilities. This paper will look at three cases centered on educational malpractice and the issues arising from them.

Constitutional Issues

Because a successful constitutional approach claiming a "right" to education was employed to overcome barriers to equal access, equal opportunity, and equitable allocation of resources in *Brown, PARC,* and *Serrano,* and because the constitutions of most states speak specifically of education, the constitutional approach is deemed possible by some experts. However, the prospects for a successful constitutional argument are dimmed when one considers the decision of the United States Supreme Court in *Rodriguez v. San Jose Unified School District* which stated that education is *not* a right explicitly guaranteed by the federal Constitution.

Therefore, one needs to examine a legal approach based on common, tort, or statutory law. There is virtually no law in this area, and the actions suggested will be by analogy to the law of professional malpractice and by application of general principles of tort and contract law.

Key Concepts

Malpractice, as defined in *Black's Law Dictionary,* is "any professional misconduct, unreasonable lack of skill or fidelity in professional . . . duties; evil practices, or illegal or immoral conduct."[1] *Ballentine's Law Dictionary* defines *malpractice* as a "violation of a professional duty to act with reasonable care and in good faith without fraud or collusion."[2] For the purpose of this discussion, *educational malpractice* will be defined as the loss of educational benefits when teachers negligently or intentionally fail to conform to minimum standards of professional competence.

Given statutory provisions permitting suits against the state, we may assume that most states are no longer afforded blanket privileges of immunity for one reason or another and therefore may be held liable for the actions of their teachers. Since teachers are usually protected by state laws requiring boards to assume responsibility for their actions in the "normal" performance of their duties, school boards and administrators are the targets of most suits.

The following claims appear in malpractice suits: negligence, intentional tort, misrepresentation, and breach of statutory or constitutional duties.

Negligence

Negligent conduct is simply described as that conduct in which a reasonably careful person would not engage. Prosser states:

> Professional men in general, and those who undertake any work calling for special skill are required not only to exercise reasonable care in what they do, but to possess a standard minimum of special knowledge and ability.[3]

Because teachers consider themselves professional people, the public may demand conduct consistent with that label.

The essential ingredients of a negligence suit are (1) a negligent act or omission, (2) a legally recognized harm, (3) cause in fact, (4) proximate cause, and (5) duty. Negligence against a teacher may be applied thusly:

> A suit against a teacher to recover damages for a student's failure to learn because of teacher incompetence can easily be framed in the language of a typical negligence suit. At the very least, the plaintiff's case would involve establishing that the student's failure to learn is a 'harm' cognizable in tort, that the teacher was negligent, that 'but for' that negligence the student would not have suffered this harm, and that teacher had a duty to teach the student non-negligently. Proximate cause is self-evidently present under most interpretations of the term. A student's failure to learn is clearly among the foresee-

EA 014 367

able risks of a teacher's poor classroom methods, thus satisfying one formulation of the term. Under the second major interpretation, proximate cause exists because a student's failure to learn is a direct consequence of the teacher's incompetent teaching.[4]

The first problem posed is the determination of the standards a teacher may be judged on, and by whom that judgment is to be made. A professional person is to be judged on more than the "reasonable man" criterion—he is to be judged in comparison with his professional peers, based on his conformity to the norm or minimum of that professional community he works in. We are told that this type of comparative standard, holding teachers to only a community norm, should keep down the number of malpractice suits.

Proof of negligence involves expert testimony, evidence showing failure to follow statutorily prescribed standards, and circumstantial evidence (inferences from unsatisfactory results). Using a comparative method of proof, a plaintiff could establish causation by providing that a class in which he is a member performed significantly worse than did classes identical in all aspects except for the defendant (teacher).

Courts have held teachers and districts liable for physical injuries to students caused by negligence of teachers. Does this mean that negligence in instructional duties exists only when risk of serious injury to a student is involved? We may posit that preventing failure of a student to learn is arguably no less important than preventing physical injuries. In addition, there are other areas of nonphysical injury, such as defamation or invasion of privacy, where recovery has been permitted in schools. Once teachers, schools, or school districts undertake to provide education, they assume the duty to educate nonnegligently, according to Prosser.[5]

Intentional Tort

This theory is akin to intentional infliction of mental distress. Intentional denial of an educational benefit is beyond the present parameters of tort law. However, it provides a possible framework for a suit of this type because it is probably more elastic in recognizing new types of injury than is the law of negligence.

Suppose, for example, that a high school English teacher with preconceptions about the limited educability of his ghetto students decides not to teach them literature, but instead distributes comic books or third grade reading matter. Suppose that a high school teacher of science with a similar appraisal of his students decides that there is no reason for them to learn chemistry and spends the term trying to inculcate passivity, deference, and good behavior. Depending on the teacher's state of mind, this behavior might be characterized as an intentional tort.

Misrepresentation

Another claim used in educational malpractice suits is that of misrepresentation. A student/plaintiff may seek recovery on a theory of negligent or intentional misrepresentation such as that used in the case of Peter Doe. Example: A teacher sends home satisfactory reports when the student is not really doing satisfactory work. As a result of these reports, the student does not receive remedial work, and he is eventually allowed to graduate with inadequate skills. Prosser details the following elements of a cause of action in deceit which seems to parallel the circumstances aforementioned:

1. A false representation made by the defendant.
2. Knowledge or belief on the part of the defendant that the representation is false—or, what is regarded as equivalent, that he has not a sufficient basis of information to make it.
3. An intention to reduce the plaintiff to act or to refrain from action in reliance upon the misrepresentation.
4. Justifiable reliance upon the misrepresentation on the part of the plaintiff, in taking action on refraining from it.
5. Damage to the plaintiff, resulting from such reliance.[6]

A representation made without being aware it is a falsehood has also been found to be negligent if the defendant did not take reasonable care to determine the truth. An administrator needs to be aware that a parent will rely on that representation which implies that more than reasonable care be taken in such matters.

Breach of Statutory Duty

Breaches of statutory duty provide a final category of claims. These include lack of certification, a supervisor's poor evaluations, general failure to conform to statutory educational requirements, and failure to use recognized teaching methods. Authorities suggest that a lack of certification is evidence of negligence where injury results from performance of a function for which certification is required by law. Lack of statutorily required certification is evidence relevant to a showing that the defendant failed to meet the standard of conduct required of certified members of the profession. An example of failure to conform to recognized teaching methods as a legitimate claim for remedy may be seen in the case of *Gardner v. State*. In this case a negligence claim was filed and won for injuries incurred by a student due to the failure of a teacher to give gymnastic instructions according to the prescribed methods.

Justice J. Suozzi utilized the breach of statutory duty argument in a dissent in the *Donohue v. Copiague School District* case on July 31, 1978. He addressed the charges that Donohue failed various subjects, that the defendants were aware of this, and failed to (1) ascertain the reasons for these failures and (2) prescribe appropriate corrective measures. In his opinion, he quoted sections of the State Education Law (4404) and the Education Commissioner's Regulations (203.1), which clearly delineated a duty to do more than promote this plaintiff from one year to the next. Suozzi stated:

> The plaintiff has, therefore, shown the existence of a mandatory statutory duty flowing from the defendant to him personally, and has alleged the breach thereof by the defendant. To dismiss the complaint, as the majority proposes, without allowing the plaintiff his day in court, would merely serve to sanction misfeasance in the educational system.[7]

Evaluations of a teacher by a principal or supervisor might also be used as evidence in a negligence case. This has additional implications in that if a principal retains a teacher who has been evaluated as unsatisfactory and that teacher is sued, the principal will also be liable for charges of negligence in performing his duty.

Basic Questions

Three questions appear basic to the educational malpractice issue: Do school administrators, teachers, and guidance counselors owe a legal duty to students to exercise the ordinary skill and competence of a reasonable and prudent member of their profession? Should educators be accountable for failure to exercise due care in the discharge of their school duties? And finally, do the three broad areas of tort law (negligence, intentional tort, and misrepresentation) exist in malpractice cases? We shall look for the answers to these questions in the examination of the three cases.

First we need to briefly outline options available to the plaintiff and the defense in negligence proceedings. Initially, the plaintiff spells out the specific injury and the precipitating acts he will claim were negligent. The plaintiff then attempts to show that the acts he has described were the proximate cause of his injury. All inclusive evidence need not be shown. The plaintiff needs only demonstrate a "reasonable probability" that the defendant's acts, rather than some other cause, produced the "ill effect."

Although the plaintiff assumes the burden of establishing a causal connection between injury and malpractice, many defendants also address the causation issue, attempting to show that other causes account for the plaintiff's problem. School districts

under fire will draw upon a preponderance of evidence which shows that children succeed or fail in school for a variety of reasons.

A defense strategy of contributory negligence is sometimes called upon wherein the defense pleads that although some of the injury resulted as alleged, it was due, in part, to the negligence of the plaintiff. The defense might also choose to implicate the student's parents as third-party defendants. In this case the school district would argue that the student's parents neglected or failed to supervise their child and consequently are liable along with the school district.

Cases Illustrative of the Basic Questions

Peter W. Doe v. San Francisco Unified School District, App. 131 Cal. Rptr. 854

Facts

Peter Doe (pseudonym) was an 18-year-old Caucasian male high school graduate. His IQ was determined "normal" by the San Francisco School District. During the course of his 13 years in public schools, he maintained average grades, regular attendance, and never encountered any serious discipline problems. He advanced year by year through the public school system until he received his diploma. At various points during his school career, his parents expressed concern over his apparent difficulty in reading. They were repeatedly assured that he was reading at an average level and had no special problems. Shortly after graduation, the boy was examined by two private reading specialists who agreed that he was reading at approximately the fifth grade level. Following the tests and diagnosis, Doe was given private reading tutoring and made significant progress, improving his reading level. The complaint against the school district contended that Doe was deprived of an education in the basic skills of reading and writing as a result of the acts and omissions of the defendants. The suit was based on two basic tort theories, negligence and false representation. Nine distinct grounds of the district's liability were cited:

1. Defendants negligently failed to provide the plaintiff with adequate instruction, guidance, counseling, and/or supervision in basic academic skills and negligently failed to ascertain accurate information as to plaintiff's educational progress and abilities. (General negligence)
2. Defendants falsely represented to the plaintiff's parents that he was performing at or near grade level in reading and writing and was not in need of special or remedial assistance, whereas the plaintiff was, in fact, performing drastically below grade level and in great and severe need of special assistance. (Misrepresentation)
3. Defendants violated relevant provisions of the California Education Code charging school authorities with the duty of keeping parents accurately informed as to the educational progress of their children, and that without such accurate information plaintiff's parents were unable to take any action to protect their minor son from harm suffered. (Breach of statutory duty)
4. Defendants violated relevant provisions of the California constitution and Education Code charging defendants with the duty to educate plaintiff and other students with basic skills of reading and writing. (Breach of statutory duty)
5. Defendants violated relevant provisions of the California Education Code providing that no student shall receive a diploma or graduation from high school without minimum standards of proficiency in basic academic skills. (Breach of statutory duty)
6. Defendants violated provisions of the California Education Code requiring inspection and revision of curriculum and operation of the schools to promote the education of pupils enrolled therein. (Breach of statutory duty)
7. Defendants violated relevant provisions of the California Education Code requiring school districts to design the course of instruction to meet the needs of individual students. (Breach of statutory duty)

Another cause of action stated that:

8. By the acts and omissions of the defendants, their agents, and employees, the plaintiff has been deprived of an education guaranteed by the U.S. Constitution and the laws and constitution of the state of California. (Constitutional duty)
9. The State Board of Education and its agents and employees failed to properly discharge their statutory duties, including promulgating a minimum course of instruction to meet the needs of pupils, minimum standards of proficiency for graduation from high school, and administration and supervision of the educational system in California. (Breach of statutory duty)[8]

As a result, it was claimed that the plaintiff had suffered a loss of earning capacity because of his limited ability to read and write, was unqualified for any employment other than the most unskilled, low-paid, manual labor requiring little or no ability to read and write, and had suffered mental distress and pain. The complaint asked that punitive damages of $500,000 be assessed in addition to the general damage and costs of private reading tutoring and court costs.

Holdings of the Court

The court held that a person who claims to have been inadequately educated by the public school system has no cause of action in tort against the public authorities who operate and administer the system.

Reasoning of the Majority

1. Negligence:
   There was no workable "duty of care" and no degree of certainty that the plaintiff suffered injury within the meaning of the tort law of negligence.
2. Misrepresentation:
   A complaint alleging intentional misrepresentation must include allegations that the plaintiff relied on the misrepresentation. Since no claims were included in the Doe complaint, no legal cause of action existed.
3. The court stated that the schools were already beset with social and financial problems which had gone to major litigation, but for which no permanent solution had yet appeared. . . . The ultimate consequences, in terms of public time and money, would burden them—and society—beyond calculation.

Basic Concepts

"Unlike the activity of the highway or the marketplace, *classroom methodology affords no readily acceptable standards of care, or cause, or injury*. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught . . ."

"Substantial professional authority attests that the *achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers*. They may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified."[9]

Donohue v. Copiague Union Free School District, 64 AD2d 29, July 31, 1978

Facts

Donohue complained that although he received failing grades in several subjects and lacked basic reading and writing skills he was permitted to graduate. His reading level was later adjudged to be second or third grade. Following graduation he found it necessary to seek tutoring in order to acquire those skills which he had not obtained in high school. He asked for $5,000,000 in damages for the alleged deficiencies in his knowledge. Three grounds of the district's liability were cited:

1. The defendants owed a duty of care to teach the several and varied subjects to the plaintiff to ascertain his learning capacity and ability, and correctly and properly test him for such capacity, evaluating his ability to comprehend the subject matters sufficiently to achieve passing grades and therefore qualify for graduation. (Negligence)
2. The defendants failed to evaluate the plaintiff's mental ability and capacity to comprehend the subjects taught; failed to provide adequate facilities, teachers, administrators, psychologists, and other personnel trained to take the necessary steps in the testing and evaluation processes. Failed to teach the plaintiff in such a manner that he could understand and cope with the various subjects; failed to properly supervise the plaintiff; failed to advise his parents of the difficulty and necessity to call in psychiatric help; failed to adopt the accepted professional standards and methods to evaluate and cope with plaintiff's problems which constituted educational malpractice. (Breach of statutory duty)
3. The defendants failed to educate the plaintiff, a third-party beneficiary of a duty imposed upon the district by Section 1 of Article XI of the New York constitution which provides that the legislature provide for the maintenance and support of a system of free schools, wherein all children of the state may be educated. (Breach of statutory duty)

Holdings of the Court

This court held that there was no cause of action for negligence as in that state there was no legal duty, for reasons of public policy, to exercise reasonable care in the instruction and supervision of students. Furthermore, a cause of action alleging the negligent breach of statutory duties did not state a recognizable claim since the statutes were not intended to protect against injury, but rather were designed to confer a benefit upon the general public, and therefore did not give rise to a cause of action by an individual to recover damages from their breach.

Reasoning of the Majority

Basing their reasoning on the *Doe* case, the court held that the plaintiff's failure to achieve educationally could not be characterized as an injury within the meaning of tort law; that Donohue's failure to learn did not bespeak the teacher's failure to teach; and that although teachers and other school officials could be held to answer for the failure to faithfully perform their duties, they could not be sued for an alleged failure to reach certain educational objectives.

Dissenting Opinion

Justice J. Suozzi compared the negligence in this case to that of a doctor who, although confronted with a patient with a cancerous condition failed to pursue medically accepted procedures to diagnose and treat the condition. Donohue displayed a serious condition through his failing grades, and the school officials made no attempt, as they were required to do, to diagnose and treat the learning problem. Suozzi stated, "Instead, the plaintiff was just pushed through the educational system. . . . Under these circumstances, the cause at bar is no different from the analogous case of action of medical malpractice. . . ."[10]

Basic Concepts

"The courts are an inappropriate forum to test the efficacy of educational programs and pedagogical methods. . . . It simply is not within the judicial function to evaluate conflicting theories of how best to educate."[11]

Hoffman v. Board of Education of New York City, Index No. 12593/71, Supreme Court of New York, Queens Court, 1976; and New York State Court of Appeals, December 1979

Facts

As a result of an evaluation made at age six, Daniel Hoffman was placed in the district's classes for mentally defective and mentally retarded students where he remained throughout his school career. Hoffman was never reevaluated even though the school psychologist who originally tested Hoffman recommended further testing because the boy's severe speech defect made it difficult to assess his mental ability. At age 18, Hoffman applied for admittance to a district-run occupational center where he was denied admission following evaluations. These evaluations showed that he was *not* mentally retarded and therefore ineligible for admission. Hoffman instituted legal proceedings against the district for deprivation of 12 years of learning opportunity, the resulting loss of earning capacity, and increased private expenditures for services which the school should have provided him. He sought $1.5 million in damages.

Hoffman claimed that the defendants were negligent in evaluating him and failing to reevaluate him, hired incompetent personnel, did not properly supervise said personnel, deprived the plaintiff of necessary speech therapy, and misled plaintiff's guardian as to the true nature of his capacities and condition.

Holdings of the Court

In 1976 a jury awarded $750,000 in damages to Hoffman in his original suit. A December 1979 decision by the New York State Court of Appeals reversed that decision on the basis that the judicial system is not the proper forum to test the validity of educational decisions. The court also noted that they ought not to interfere with the professional judgment of educators, suggesting that Hoffman should have turned to the New York State Commissioner of Education for help.

Reasoning (First Case Hearing, 1976)

1. New York State Education Law requires placement determined by examination by an approved psychologist or psychiatrist, and that according to standards of practice codified in federal regulations needs to be repeated at least every three years. Thus, the plaintiff proved negligence on the part of the defendant.
2. Based on the evidence presented in the *Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania*, there is a presumption that placement in a regular public school class would have been preferable to placement in a special public school class:

   > The stigma of bearing the label 'retarded' is bad enough, but to bear the label when placement is questionable or outright erroneous is an intolerable situation.

Basic Concepts (First Case Hearing, 1976)

The following standard for defining educational negligence/malpractice was set forth:

> Simply stated, negligence is a lack of ordinary care. It is a failure to exercise that degree of care which a reasonably prudent school system would have exercised under the same circumstances, (whether) from doing an act which a reasonably prudent school would not have done under the same circumstances . . . One who has had special training in the field of education has the duty, while acting in his professional capacity toward others who rely on his special skills, to exercise that skill and degree of care which others in the same profession in the community would ordinarily exercise under the same circumstances. If you find that the defendant through its employees failed to exercise that skill and degree of care which other educators in the community would normally have exercised under the same circumstances, you will find the defendant negligent.[12]

Summary and Conclusions

Three educational malpractice cases have been unsuccessfully argued. Although the plaintiffs lost, the cases have served to bring forth the issues and problems inherent in educational malpractice litigation. The cases are thought to have been responsible in some part, for a significant amount of self reform in educa-

tion initiated to avoid further cases in which the courts and legislatures would be given the opportunity to enter into educational policymaking.

It appears that in finding for the school districts in these three cases, the courts seriously considered the possibility of a flood of litigation which might ensue with a finding for the plaintiff, perhaps much of it without merit. They may have also assessed the difficulty of framing an appropriate measure of damage for the plaintiffs.

While the fear of a wholesale onslaught of educational malpractice suits has subsided somewhat with these decisions, these cases serve as efforts to call attention to the fact that the American educational system has failed to provide children with the quality of education they are entitled to and to provide legal theories which seek to open new avenues within the common law.

In *Brown* (1954), the United States Supreme Court stated that education is perhaps the most important function of state and local governments. Given this status, one might suspect that the courts will *not* find a lack of legal precedent sufficient reason to ignore cases of educational malpractice. In the past, the courts have expanded the law to create remedies for injuries not previously recognized in tort.

Prosser has shown:

> The progress of the common law is marked by many cases of first impressions in which the court has struck out boldly to create a new cause of action where none has been recognized before. . . . The law of torts is anything but static, and the limits of its development are never set. When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not of itself operate as a bar to recovery.[13]

Most administrators accept the notion that a school district is no longer immune from the detrimental acts of its employees, and that teachers have special obligations to their students to cause them to learn basic skills or refer those students who cannot to specialists for help.

Given these responsibilities, administrators must be aware of remediation a court could mandate for failure to meet such obligations, that is, replacement of incompetent teachers, payment of remedial instruction, or monetary compensation for loss of future income to students deprived of educational benefits due to negligence. It is imperative that administrators understand the concept of negligence and work toward eliminating possibilities for this type of action.

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